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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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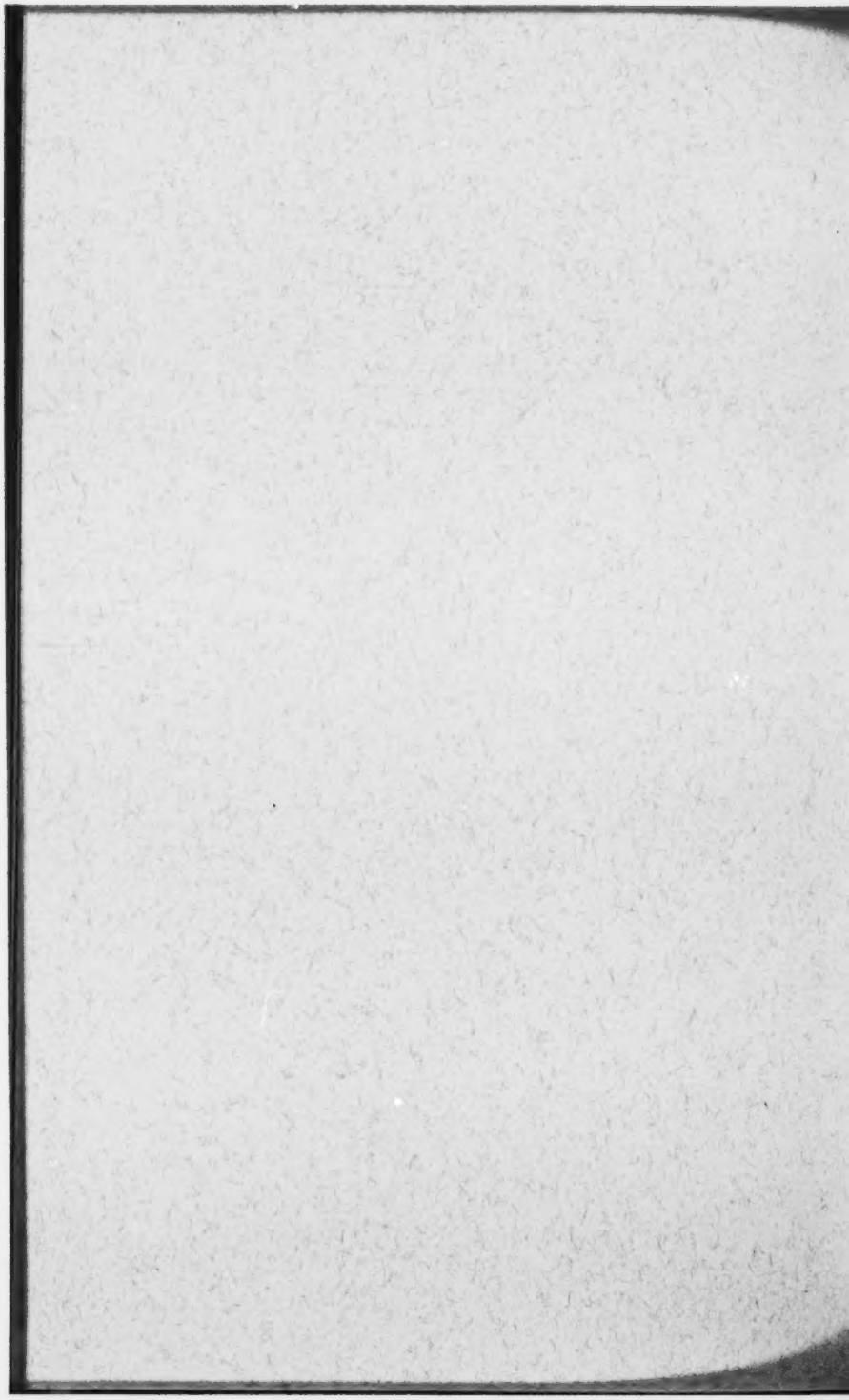

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Viking Pump Company, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Eighth Circuit, enforcing an order of the National Labor Relations Board, entered July 29, 1940 (R. 625); rehearing denied September 9, 1940 (R. 626).

Statement.

This is an original proceeding filed by the National Labor Relations Board to enforce an order issued by it against the Viking Pump Company on July 13th, 1939.

In the charges filed by Lodge 1683, Amalgamated Association of Iron, Steel & Tin Workers of North America,

through the Steel Workers Organizing Committee, affiliated with the Committee for Industrial Organization, and in the complaint issued by the National Labor Relations Board, the Viking Pump Company was charged with unfair labor practices, in the illegal discharge of certain employees because of union activity, and for suggesting the formation of a bargaining committee composed solely of the Company's employees, and by other acts interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Statute 449, 29 U. S. C. 151, *et seq.*).

The National Labor Relations Board in its order of July 13, 1939, ordered the Company to cease and desist from interfering with and discouraging its employees in their right to form or join a labor organization. Also ordered the reinstatement of three former employees, Harold Paulson, Ferris Aldrich and Lloyd L. Siglin, with back pay. The Company failed to comply with the order of the Board. Thereupon the Board petitioned the United States Circuit Court of Appeals for the Eighth Circuit for an order of enforcement. Issue was joined by the Company, and the matter was heard and determined by the court, and its decision rendered, ordering compliance on the part of the Company with the Board's order.

A petition for rehearing in said court having been denied, the Company brings to this Court its petition for the issuance of a writ of certiorari herein.

II.

Basis of Jurisdiction of This Court.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Reasons Relied On for the Allowance of the Writ.

(1) The decision of said Circuit Court of Appeals as to the discharge of Harold Poulson and Ferris Aldrich is in conflict with the decision of the Circuit Court of Appeals of the Sixth Circuit, in a similar matter, in the case of *National Labor Relations Board* v. *Empire Furniture Corporation* (6th Cir.), 107 F. (2d) 92, at 95.

(2) The decision of said Circuit Court of Appeals, with reference to the discharge of Poulson and Aldrich, is erroneous, and completely ignores the evidence as to the true reasons for the discharge of said persons, viz: First: Insubordination and refusal to follow the directions and obey the orders of their superiors; and, Second: Abuse, coercion and intimidation of their fellow employees in their attempts to compel them by force to join the Union.

Discharge for either or both of said reasons did not constitute an unfair labor practice on the part of the Company.

(3) The Circuit Court of Appeals erred with reference to the alleged discharge of Lloyd Siglin, *as he was not discharged.*

(4) The decision of said Circuit Court of Appeals with reference to the discharge of Poulson, Aldrich and Siglin, on the testimony adduced, by holding that they were discharged for engaging in permissible union activity in the plant during working hours, so far departs from the accepted and usual course of judicial proceedings, as to call for this Court's power of supervision.

(5) The decision of said Circuit Court of Appeals is contrary to the evidence in the case, and is not sustained by the substantial, competent, material and admissible evidence in the case.

(6) The decision of said Circuit Court of Appeals to the effect that the appointment of a committee by the employees to confer with the management concerning hours and wages, was done for the purpose of circumventing or interfering with the formation or functioning of the Union, is erroneous, and is not supported by the substantial, competent, relevant and admissible testimony.

(7) The decision of said Circuit Court of Appeals that the voluntary formation of the committee of employees to confer with the management on the matter of wages and hours was not a mere temporary expedient, to allay the existing unrest, hatred, ill will and turmoil in the plant, is erroneous, and is not sustained by the substantial, competent, relevant and admissible testimony. And even though the court should determine that the meeting was instigated by the management, for the purpose of composing the differences between the divergent elements of the employees, to allow normal production to be resumed in the plant, would not constitute an unfair labor practice.

(8) The decision of said Circuit Court of Appeals that the Company interfered with the right of the employees to form and join the union of their choice, is not sustained by the substantial, competent, relevant and admissible evidence, but is based on mere hearsay, rumor and conjecture.

(9) The decision of said Circuit Court of Appeals in sustaining the Board's order that the Company should reimburse the employees, Poulson, Aldrich and Siglin for wages lost during the time they were out of the Company's service, is erroneous, and completely ignores the true reasons for their discharge.

(10) The decision of said Circuit Court of Appeals sustaining the Board's order with reference to the deduction of monies received by said employees for work performed

on Federal, State, county, municipal or other work relief projects, and to pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal or other government or governments, which supplied the funds for said work relief projects, is erroneous and not in accordance with applicable law.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Subject Index.

A subject index covering this Brief and the petition for writ of certiorari precedes the petition.

The Opinions Below.

The opinion of said Circuit Court of Appeals, which was handed down on July 29th, 1940, in a proceeding entitled *National Labor Relations Board, Petitioner,* v. *Viking Pump Company, Respondent,* had not at the time of the preparation of this petition been officially reported, but is printed in the record (R. 619-625), with rehearing denied September 9th, 1940 (R. 626). The decision and order of the National Labor Relations Board, which is the subject matter of this case, appears in the Record at pages 586-606 and is reported in 13 N. L. R. B. No. 65 (1940).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered July 29th, 1940 (R. 625); rehearing denied September 9th, 1940 (R. 626). The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925 (28 U. S. C. 347). The cases believed to sustain said jurisdiction are as follows:

National Labor Relations Board v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 57 S. Ct. 615; 81 L. Ed. 893,

And companion cases.

Statement of the Case.

This appears at page 1 of the petition for writ of certiorari.

The reasons relied on for the allowance of the writ appear at pages 3 to 5 of the Petition for Writ of Certiorari.

Specifications of Errors to be Urged.

The following specifications of errors are urged in connection with the Reasons relied on for the allowance of the writ as set forth in the Petition for Writ of Certiorari at pages 3 to 5.

(1) The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the Company had interfered with, restrained and coerced its employees in their right of self organization.

(2) The Circuit Court of Appeals erred in holding that it had been established by substantial testimony that the Company had engaged in unfair labor practice in the alleged illegal discharges of employees Harold Poulson and Ferris Aldrich.

(3) The Circuit Court of Appeals erred in holding that the charge that the Company had been guilty of unfair labor practice in the alleged illegal discharge of Lloyd Siglin had been sustained by substantial evidence.

Argument.

A summary of the facts, together with a statement of the questions presented and the reasons relied on for the allowance of the writ is set forth in the Petition to which reference is hereby made. In our argument on each of the questions presented we will briefly summarize the facts in the respective questions as may be required.

POINT A. The finding and decree of the Circuit Court of Appeals in relation to the matter of the alleged interference by the Company with the right of the employees to join the union of their own choosing, to bargain collectively etc., is not supported by substantial evidence.

Findings of unfair labor practices by the Board must be supported by substantial evidence.

National Labor Relations Board v. *Empire Furn. Co.*, (6 Cir.) 107 F. (2d) 92.

The Act in providing that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means that such findings, to be conclusive, must be supported by substantial evidence. And the substantial evidence necessary to impart conclusiveness to the findings of the Board is more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion.

Consolidated Edison Company v. *National Labor Relations Board*, 305 U. S. 197; 59 S. Ct. 206; 83 L. Ed. 126.

The findings of the Board are conclusive if supported by evidence, which means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.

Cupples Company Mnfrs. v. *National Labor Relations Board,* (8 Cir.) 106 F. (2d) 100.

The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.

National Labor Relations Board v. *Thompson Products,* (6 Cir.) 97 F. (2d) 13;

National Labor Relations Board v. *Empire F. Corpn.,* (6 Cir.) 107 F. (2d) 92.

The respondent (Company) is not bound by statements of its employees unless their positions clearly indicate that their statements are indicative of the respondent's policy.

National Labor Relations Board v. *Sands Mfg. Co.,* 306 U. S. 332; 59 S. Ct. 508; 83 L. Ed. 682.

The provision of the National Labor Relations Act that "any individual employee or group of employees shall have the right at any time to present grievances to their employer" does not inhibit adjustment of individual grievances directly between employee and employer and such procedure is entirely consistent with collective bargaining in matters affecting employees as a class.

National Labor Relations Board v. *Union Pacific Stages,* (9 Cir.) 99 F. (2d) 153.

When a majority of the employees have selected their representative the National Labor Relations Act forbids the employer from negotiating labor contracts with any one else but when a majority have not selected a representative or when there is a fair doubt as to who is the majority rep-

resentative the employer may negotiate with any one willing to confer.

Eastwood-Neally Corpn. v. *International Association of Machinists,* 124 N. J. E. 274 (1 Atl. (2d) 477).

And where there has been no selection, by a majority of employees, of a labor organization as their representative for collective bargaining under the National Labor Relations Act, a minority of employees may make their own choice of a bargaining representative.

Consolidated Edison Company v. *National Labor Relations Board,* 305 U. S. 197; 59 S. Ct. 206; 83 L. Ed. 126.

The Board has urged and the Circuit Court of Appeals found that the petitioner Company called a meeting of the employees in the small pump department. There is no evidence in the record that the Company called any meeting or had anything to do with it. It is manifest that, under their legal and constitutional rights, employees on their own motion may meet and discuss independent union or any union; they may select a committee to wait on the management; and in fact may do anything that any other American citizen may do. A foreman has the authority, and it is his obligation, to direct the employees in the performance of their ordinary duties in the plant, but this does not vest him with the power or authority to bind the company in respect to union recognition or rejection, the formation of a union, or the selection of a committee, or anything aside from the usual routine involved in production or transportation, without special authorization from the management.

In this case there is no evidence that any foreman was vested with any such power by the company. And Harry Petersen, foreman of the small pump department, does not purport to quote the President, Mr. Wyth, and there is no

evidence that he was authorized to speak for him. The only evidence on this subject consists of statements made by foremen, and were but mere expressions of opinion by them, as to what they thought might happen under certain contingencies, and did not necessarily reflect the policy of the company. And this evidence was pure hearsay, rumor and conjecture.

Prior to the time of this meeting there had been no attempt on the part of any union, or any representative thereof, to confer with the management on any subject of interest between the employees and management; and no notice or intimation to the company that any union, or representative thereof, desired to confer with the company. But on account of the unrest and turmoil in the plant, the hatred and ill will between the factions, composed of union sympathizers on the one hand, and those opposed on the other, it was imperative that something be done, though it be of a temporary character, to quell the insurrection in the plant, and allow the orderly procedure of production and transportation to be resumed. The employees had the right to take such action to protect their jobs and their vital interests. This need not interfere with a different organization later on.

The meeting of the men held in the stock room on May 5, 1938, was instituted and controlled by the employees themselves, and was called to order by one Hans Juhl, a mechanical trouble shooter in the factory and the field, having no executive or supervisory right, power or authority whatsoever. And was held for the purpose of composing the differences existing, to alleviate the seething ferment, to restore the morale of the employees, and to allow normal production in the plant to prevail. Juhl was but an employee and could not by his statements bind the company, or subject it to regulatory provisions, unless specifically authorized so to do.

The decision of the court below holds that an employer may be found guilty of unfair labor practices because of isolated acts of a few minor supervisory employees although there was no finding that the employer had authorized, ratified or approved the acts. This language indicates a complete disregard for established rules of agency. In the first place it attaches a quasi-criminal responsibility on the principal for acts of an agent of limited powers, without any proof that the acts were either authorized or approved. In the second place, it presumes to rest responsibility for a violation of the law upon the basis of apparent authority, although the doctrine of apparent authority is based entirely upon principles of estoppel and assumes that there is no actual or implied authority.

The National Labor Relations Act does not abrogate or abridge the right of free speech, and employers, and supervisory and other employees, have the right to express their individual opinions as to unionization and the type or style of union they favor, or that they favor none. And superintendents and foremen may express to employees their preferences in this regard without laying themselves open to the charge of having committed an unfair labor act. In this case the statements of the foremen were only as to individual preferences and not with any intention to bind the company, or to assume any authority with respect thereto.

The men had the right to select a committee to deal with the company in the discussion of grievances, irrespective of any union or organization. And in meeting assembled, and of their own volition, they selected such a committee. The committee met with the management, the result of the meeting was acceptable to the men, the proposal of the committee was adopted, and the committee lapsed. It was but a temporary matter, to meet the exigencies of the time, and need not interfere with any later organization of whatever kind.

The avowed purpose of the act is to prevent any disturbance to the free flow of goods in interstate commerce, and, because of the action taken, as described, the differences among the employees were composed, peace restored, and there was no cessation of activities in the plant of the company, and no interference with interstate commerce.

POINT B. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had engaged in unfair labor practice in the discharge of one Harold Poulson.

Harold Poulson was a machine operator in the main plant under Frank Cole as foreman. His discharge from the service of the company is claimed to constitute an unfair labor practice. The evidence is that as an employee he insisted on making his own terms before entering on the performance of the work he was ordered to do. And refused to follow the directions of his superior in his production work in the plant.

Moreover, Poulson repeatedly left his machine during working hours in the plant to annoy and harass other employees by urging and insisting that they join the union, and repeatedly threatened that they would lose their jobs if they did not. He continually threatened and abused his fellow employees, and repeatedly told them that if they did not join the union, they would not have any jobs. Complaints of the men to this effect were communicated to the foreman and the superintendent, and after warnings to desist, which were unheeded, Poulson was discharged.

On this branch of the case the proof as to Poulson's participation in such acts is amply supported by the testimony of Gushard (R. 307, 339), Cole (R. 252 to 254, 272 to 276), Vernon Johnson (R. 381, 385), L. W. Sisson (R. 353, 358), Glenn Ward (R. 389, 390, 391), Faye Olmstead (R. 376, 377), Louis Shimpack (R. 404, 405).

POINT C. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had been guilty of unfair labor practice in the discharge of Ferris Aldrich.

Ferris Aldrich was an inspector in the small pump department of the plant. He was discharged because he solicited memberships in the union during working hours, repeatedly threatened his co-employees that unless they joined the union they would lose their jobs, hid their tools, and spent too much of his time in union organizational work during working hours in the plant, and although warned by his foreman to watch his step, persisted in such conduct. The testimony of Bernard Petersen (R. 371, 372), Earhart Jensen (R. 396-402), Harry Petersen (R. 407, 408), Foster L. Gushard (R. 316, 317), fully substantiate the charges. And his foreman, Harry Petersen, further testified (R. 408) that after his discharge he did not want him back, on account of his actions in the plant.

> The only evidence that could possibly connect his discharge to Union activity is solicitation of members during working hours, and abuse of fellow workers. If so connected, his discharge was not in pursuance of an unfair labor practice.
>
> *National Labor Relations Board* v. *Empire Furniture Co.*, (6 Cir.) 107 F. (2d) 92 at 95.

> We have recently pointed out (National Labor Relations Board *v.* Sands Manufacturing Company, (6 Cir.) 96 F. (2d) 721) that the statute does not interfere with the employer's right to discharge for violation of contract, and that discharge is not an unfair labor practice merely because the discharged employee is a member of a union.
>
> *National Labor Relations Board* v. *Empire F. Company, supra.*

The jurisdiction to review the orders of the National Labor Relations Board is vested in a court with

> equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.
>
> *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, 59 S. Ct. 80, 83 L. Ed. 221.

We submit that the discharges of said Poulson and Aldrich were justified, for the reasons that they had been guilty of acts of insubordination and were insolent and pugnacious, and they had repeatedly left their stations during working hours, to solicit memberships in the union, had threatened and intimidated their fellow employees during working hours in the plant, had attempted to coerce them into joining a particular labor union by abuse and threats; and their discharges for such actions, after warnings from their superiors to desist from such conduct, did not constitute an unfair labor practice on the part of the management.

It is manifest that the Circuit Court of Appeals failed to give consideration to the acts and conduct of Poulson and Aldrich with reference to their endeavors to force their fellow employees to join the union, and to abuse, coerce and intimidate them during working hours in the plant. Inasmuch as Poulson and Aldrich are the real parties in interest, and are seeking redress for supposed wrongs, and as they have not come into a court of equity with clean hands, they are not entitled to the relief they ask, *i. e.*, their reinstatement in the company's plant.

This Court is one with equity powers, and has the right, power, authority and jurisdiction to modify or change the order of the Board, and the decree of the Circuit Court of Appeals, to conform to the law and facts of the case, and to make its order consonant with the circumstances of the

particular transaction, without imposing any onerous burden upon either of the parties, or requiring something to be done which might impede or obstruct the resumption of peaceful relations between employer and employee.

POINT D. The Circuit Court of Appeals erred in holding that it had been established by substantial evidence that the company had engaged in unfair labor practice in the alleged discharge of Lloyd L. Siglin.

In regard to the alleged discharge of Lloyd L. Siglin, the evidence wholly fails to show that Siglin was discharged at all. By consent of the representatives of the Board he was shifted from his position as janitor to a job in the plant. And for the time being was put on temporary work until a place could be made for him on regular work. Thereafter, on account of slack business, he, with sixteen others, was laid off temporarily.

The superintendent testified (R. 402), and his testimony is uncontroverted, that on account of a falling off in orders the company found it necessary to reduce the number of employees in the plant. At first, in order to keep all of the employees at work, it was determined that the hours of work of all of the men should be reduced. Accordingly, on February 1, 1938, working hours per week were reduced from forty-four to thirty-nine. Thereafter, business continued to decline in volume, and it was found necessary to decrease the number of employees. And on March 13th, 1938, seventeen men were laid off, among whom was Lloyd L. Siglin.

POINT E. The Circuit Court of Appeals erred in sustaining the Board's order that the company reimburse the employees Poulson, Aldrich and Siglin for wages lost during the time they were out of the company's employ.

Said decision completely ignores the fact that Poulson and Aldrich were discharged for cause, and that their discharge did not constitute an unfair labor practice. And that Siglin was not discharged, and his temporary lay off did not constitute an unfair labor practice.

POINT F. The Circuit Court of Appeals erred in sustaining the Board's order with reference to the deduction of monies received by said employees during said period for work performed upon Federal, State, county, municipal, or other work relief projects, and to pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal or other government or governments which supplied the funds for said work relief projects.

This Court has held, in the case of *Republic Steel Corporation, Petitioner,* v. *National Labor Relations Board and Steel Workers Organizing Committee,* cause No. 14, October Term, 1940, decided on November 12, 1940, and not yet officially reported, except in 85 L. Ed. 1 (Advance Sheets), that such an order is clearly erroneous.

Conclusion.

The desideratum in cases of this kind is to determine the issues pursuant to the record, and enter a decision in accordance with the law and the facts, and, acting within its powers as a court of equity, to render such decree as will protect and conserve the rights of the employees and yet cause as little friction as possible, and such as will encourage the operation of the company's plant in a smooth and efficient manner, without dislocation or trouble.

It is our contention that the Circuit Court of Appeals failed to pass upon decisive points of substance and procedure, and has failed to accord to certain evidence in the record the probative force that its importance merits.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. 151 et seq., are:

SEC. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for the employer (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

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J. Greenebaum Tanning Co. v. *National Labor Relations Board*, No. 152, this Term, certiorari denied, October 14, 1940 — 9

International Association of Machinists v. *National Labor Relations Board*, No. 16, this Term, decided November 12, 1940 — 8

Republic Steel Corp. v. *National Labor Relations Board*, No. 14, this Term, decided November 12, 1940 — 9

Subin v. *National Labor Relations Board*, No. 280, this Term, certiorari denied, October 14, 1940 — 10

Statute:

National Labor Relations Act (act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V, Sec. 151, *et seq.*):

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282314—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 619–625) is reported in 113 F. (2d) 759. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 586–606), are reported in 13 N. L. R. B. 576.

JURISDICTION

The decree of the court below was entered on July 29, 1940 (R. 625). A petition for rehearing

filed by petitioner was denied on September 9, 1940 (R. 626). The petition for a writ of certiorari was filed on December 5, 1940. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that petitioner (a) interfered with the free self-organization of its employees in violation of Section 8 (1) of the Act; (b) discriminatorily discharged two of its employees in violation of Section 8 (3) and (1) of the Act; and (c) discharged another employee for testifying in a proceeding before the Board, in violation of Section 8 (4), (3), and (1) of the Act.

2. A further question urged by petitioner but which we think is not properly presented in this case, is whether the Board may require that an employer pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work relief projects of employees discharged by the employer in violation of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings,[1] the Board issued its findings of fact, conclusions of law and order (R. 586–606). The facts as found by the Board and as shown by the evidence may be summarized as follows:[2]

About a week after a number of petitioner's employees joined the Amalgamated Association of Iron & Steel Workers in April 1937 (R. 591; 16, 19–21, 103, 198), Petersen, the foreman of the small-pump department, assembled the employees during working hours and told them that "this union business has gone far enough," that petitioner would close down the plant rather than recognize an outside labor organization, whereupon the employees would be "turned out on the street," and that, to avoid these consequences, the employees should "drop out of the union" and discuss with employees of other departments possible transforma-

[1] These, pursuant to Section 10 of the Act, were: amended charge (R. 514–515); complaint (R. 511–514); hearing (R. 1–418); Intermediate Report by the trial examiner (R. 548–558); a new charge (R. 522); a further complaint alleging the discharge of an employee because he gave testimony at the hearing held on the first complaint (R. 533); hearing on this second complaint (R. 419–510); Intermediate Report by the trial examiner (R. 568–579); and exceptions by petitioner to both Intermediate Reports (R. 559–566; 579–586).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

tion of the Viking Aid Society, a benefit society, into an inside labor organization, which petitioner would be willing to recognize (R. 591–592; 47, 129, 203–204). A meeting was held on the following day in the plant during working hours for the purpose of selecting a committee to deal with petitioner; acting under instructions from their foremen, virtually all of the 200 production employees attended (R. 591–592; 49, 96–97, 174, 187–188, 203–204, 221, 238), as did many members of the supervisory staff (R. 592; 51–52; 159–160, 178, 188, 227, 260). Gushard, superintendent of the plant, told the employees that petitioner would not tolerate an outside labor organization in the plant, and that unless a bargaining committee was chosen immediately from the employees' own ranks, the plant would be closed down (R. 592–594; 53–54, 56–57, 98–99, 132–134, 175, 210–211, 227–228, 303, 327–329).

A committee was chosen and met with Wyth, petitioner's president; that official told the committee that he would not "deal with no C. I. O." and that he had had authority to close the plant if the employees had not held the meeting at which the committee was chosen (R. 594; 182, 485). Soon thereafter petitioner announced a general wage increase, which Superintendent Gushard attributed to the efforts of the committee (R. 594; 60–62, 100–101, 181, 288–289, 304). The Board found that the purpose of the wage increase was to discourage membership in the Union (R. 594).

In July 1937 a member of the Union was discharged and rehired a few days later upon his promise to withdraw from the Union (R. 595; 126). In the fall of that year Superintendent Gushard concededly spied upon a Union meeting "to see for my own benefit how many of our men actually went to the meeting. * * * I did not consider it spying" (R. 595; 318–323).

Ferris Aldrich and Harold Poulson, both admittedly competent employees of long service with petitioner (R. 596, 598; 6, 36, 81, 172–173, 250–352, 412, 523), were discharged on August 24 and 25, 1937, respectively (R. 596, 598; 30–31, 82). They were among the most active supporters of the Union in the plant, Aldrich being recording secretary and a member of the grievance and negotiating committees (R. 596; 17, 21) and Poulson being a founder and also "Inner Guard" of the Union (R. 598; 86). They wore their Union buttons in the plant and their membership in the Union was known to petitioner (R. 596, 598; 23, 24, 65, 86, 92). The discharges, which were made precipitately in advance of the regular pay day (R. 596, 598; 31, 87), were accompanied by statements by petitioner's president and superintendent which strongly suggest that the men were discharged because of their union membership and activities (R. 596, 599–600; 31, 35–38, 91–92). Petitioner's tardy (R. 340, 344) reliance upon various acts of misconduct which it attributed to Aldrich

and Poulson plainly did not present the true reason for their severance (R. 596–598, 599; 10, 34, 66–67, 69, 77–78, 92, 112–116, 141, 161, 243, 250–251, 259, 262–263, 270–271, 274, 276, 279, 282, 289–290, 292, 306–307, 317, 337–346, 362, 396, 398, 402, 406, 409–410, 412, 523, 563).[3]

On April 29, 1938, at the hearing on the first complaint, Lloyd L. Siglin, a janitor at petitioner's plant, testified that while cleaning petitioner's conference room about a week before the hearing, he chanced upon a scrap of paper bearing the notation, "Find something on Poulson and Aldrich" and that he made a copy of the paper and turned it over to the Board's attorney (R. 600–601; 140, 143–149). On the same day that Siglin testified, petitioner had him turn in his key and at a conference with the Board's attorney held the next morning petitioner refused to reinstate Siglin as janitor but offered to give him other employment (R. 601; 429–432, 499). Siglin was given one week of temporary work but was again dismissed shortly after the close of the first hearing (R. 601–602; 432–435, 439, 441–442, 494).[4] The Board found

[3] Petitioner's assertion that Poulson and Aldrich were given previous warning about these activities (Pet. pp. 14, 15) finds no support in the record and is untenable in view of the contrary testimony of Gushard and the foremen under whom Aldrich and Poulson worked (R. 597, 599; 307, 341, 292, 276).

[4] When Siglin first reported for work pursuant to petitioner's promise of a new job, President Wyth applied an obscene epithet to him and directed his superior to send him home (R. 434). Upon his second discharge, Siglin was not permitted to

that Siglin's assignment to temporary work was designed "to forestall action by the Board while the hearing was in progress" and that the discharge was in violation of Section 8 (4), (3), and (1) of the Act (R. 602–603).

Upon the foregoing findings, the Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement with back pay to Aldrich, Poulson, and Siglin; to pay to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the three men on work relief projects; and to post appropriate notices (R. 605–606).

On February 2, 1940, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 607–610). On July 29, 1940, the court handed down its opinion (R. 619–625) and entered a decree (R. 625–626) enforcing the Board's order in full. A petition for rehearing filed by petitioner was denied on September 9, 1940 (R. 626).

ARGUMENT

1. Petitioner's contention (Pet. 3–4, 8–9) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp.

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enter the plant to get his coat and pay check (R. 445–446). His wife had done laundry work for petitioner; when Siglin testified, this work abruptly ceased (R. 601; 448–449, 451–453).

3–7) affords abundant support for the challenged findings. The contention that, in holding petitioner responsible for the anti-union acts of its supervisory employees despite the absence of authorization or ratification of those acts by petitioner, the Board and the court below have rejected "established rules of agency" (Pet. 13), is disposed of by the decision of this Court in *International Association of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940. Further, the evidence summarized above shows that the foremen, in interfering with the employees' rights of self-organization, merely emulated the actions of petitioner's president and plant superintendent. Petitioner also contends (Pet. 3) that in holding that the Board's findings as to Aldrich and Poulson have the requisite evidentiary support the decision below is in conflict with the decision in *Empire Furniture Corp.* v. *National Labor Relations Board,* 107 F. (2d) 92 (C. C. A. 6); however, that case turned, like the present case, upon its own particular facts.

2. Petitioner contends (Pet. 4–5, 18) that the decree below, insofar as it enforces the provision (R. 605–606) of the Board's order requiring petitioner to pay over to governmental relief agencies sums equal to the amounts disbursed by those

agencies for the employment on work relief projects of the three employees illegally discharged by petitioner, is contrary to the subsequent decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* No. 14, this Term, decided November 12, 1940. But in the present case petitioner raised no question in the court below concerning the "work relief" provision; that provision was not specifically challenged either in the answer to the Board's petition for enforcement (R. 614–618) or in petitioner's briefs.[5] The court below made no mention of the provision, even in its summary of the Board's order (R. 619–620), and the point was not raised in the petition for rehearing.[6] This Court has recently indicated that it does not regard a decree entered under such circumstances as an adjudication upon the validity of the "work relief" provision. *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* No. 152, this Term, certiorari denied, October 14, 1940;

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[5] Petitioner's briefs below attacked the Board's findings and order as not supported by substantial evidence; they made no mention of the work-relief provision. Brief and reply brief for respondent, No. 470, Original, Circuit Court of Appeals for the Eighth Circuit.

[6] The petition for rehearing, which is omitted from the printed record (R. 626), merely renewed petitioner's challenge of the sufficiency of the evidence. Petition of Viking Pump Company for Rehearing, No. 470, Original, Circuit Court of Appeals for the Eighth Circuit.

Subin v. *National Labor Relations Board*, No. 280, this Term, certiorari denied, October 14, 1940.[7]

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions; it should, therefore, be denied.

Respectfully submitted.

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[7] In briefs filed by the Board in the Circuit Courts of Appeals since the decision of this Court in the *Republic* case, the Board has affirmatively requested that the "work relief" provision be eliminated from its order. E. g., brief for respondent, *Eagle Picher Mining & Smelting Co.* v. *National Labor Relations Board*, No. 460, Original, Circuit Court of Appeals for the Eighth Circuit, p. 61; brief for petitioner, *National Labor Relations Board* v. *Mall Tool Co.*, No. 7476, Circuit Court of Appeals for the Seventh Circuit, pp. 26–27; brief for petitioner, *National Labor Relations Board* v. *Texas Mining & Smelting Co.*, No. 9539, Circuit Court of Appeals for the Fifth Circuit, pp. 31–32.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 152, 157, 158, 160) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

* * * * *

SEC. 10 (e). * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

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